Media Law & Ethics

RU COMS 400 Unit 4

Censorship / Prior Restraint

Prof. Bill Kovarik, PhD
wkovarik@radford.edu

Class web site:
revolutionsincommunication.com/law

Current events?

- Trump executive order Jan. 20, 2025 "Restoring freedom of speech and ending federal censorship"
  - Targets online censorship by Biden Admin.
  - Issues covered in Murthy v Missouri and Moody v Netchoice, both 2024
    - Public health and vaccine misinformation
    - State laws prohibiting online platform censorship
  - Executive branch will now secure free speech rights of citizens

Current events?

- Supreme Court Signals that landmark libel ruling is secure. - NY Times, Feb 10, 2025 (NY Times v Sullivan)
  - Las Vegas casino mogul Steve Wynn, 2018 defamation case against *The Associated Press (AP)* **was rejected last year** by the Nevada Supreme Court, petitioned the U.S. Supreme Court Feb 8 to overturn a 60-year-old landmark case that established the actual malice rule in libel law.

Recap from Section 2 / A2

- Ethics problems are like math problems
  - You have to show the work
  - Don't simply state a preference for one action or another
- Use at least three codes of ethics and one professional ethical code to make comparisons
- Weigh the relative advantages or disadvantages of the solutions that the codes imply

Recap from Section 3

- Enlightenment follows Wars of Religion
- Major figures
  - British: Francis Bacon, Isaac Newton, John Milton, John Locke, David Hume, John Stuart Mill,
  - French: Francois Voltaire, Baron de Montesquieu
  - US: Benj Franklin, Thomas Jefferson, James Madison
- Concepts:
  - Equal justice, natural rights, life – liberty – property, commerce driving history, separation church and state, marketplace of ideas, social contract, balanced 3-part gov't,, free speech and press
- Cases – John Peter Zenger

Recap Section 3

Laws & Acts of legislatures

- Va Declaration of Religious Freedom, 1786
- Bill of Rights 1791
- Alien & Sedition Acts 1798 – 1800
- 14th Amendment

Cases – John Peter Zenger, 1735 libel

Cases – Slaughterhouse 14th amendment case 1873

Dissent – Elijah Lovejoy, Ida B Wells, Charles Schenck, Benjamin Gitlow, Charlotte Whitney

Section 3 / A3

1. Your experiences with censorship in high school or university
2. Reaction to New Voices movement to encourage free speech and press in high school
3. Quote a voice from the 18th or 19th centuries in support of free speech and press

This week Section 4

- Suppression of speech by government
- Direct prior restraint / censorship
- Cases that set standards
  - Schenck, Whitney, Brandenburg
- Media cases that set standards
  - Near, Trinity, NYT v US
- Symbolic speech, compelled speech
- Hate speech, obscenity

Historical background

- Process of Incorporation (Fed > State)
  - Barron v Baltimore 1833
  - Gitlow v New York 1925
- Importance of dissenting opinions
  - Abrams & Whitney cases
- Historical shift in emphasis
  - From property rights (Lochner court) …
    - Lochner v. New York 1905
  - To human rights (Warren - Burger court)
    - Brown v Board of Education, 1954

William Blackstone

- The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications …

Blackstone on prior restraint

- … and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity… 1770

What is prior restraint?

- Censorship, or restraining ideas prior to publication
- Outright prior restraint is usually unconstitutional because it targets particular content, but regulations that are content neutral and that advance an important interest are often considered to be acceptable.
- For example, banning any billboards that advertise a certain political party or religion or civic association might be an unacceptable prior restraint. However, banning all billboards in an historic neighborhood in order to preserve the character of the neighborhood would be content neutral.

Censorship = refuge of the week

- A student newspaper and journalism program in Nebraska shuttered for writing about pride month.
- The state of Oklahoma seeking to revoke the teaching certificate of an English teacher who shared a QR code that directed students to the Brooklyn Public Library's online collection of banned books.
- A newly elected district attorney in Tennessee musing openly about jailing teachers and librarians.
- Virginia school board member wants to burn certain books

Censorship = refuge of the week

- In Florida today it may even be illegal for teachers to even *talk* about who they love or marry thanks to the state's "Don't Say Gay" law.
- The sunshine state's Republican commissioner of education rejected 28 different math textbooks this year for including *verboten* content.

First Amendment "incorporation"

- Takes place amid social upheaval after WWI
- Massacres /race riots, East St. Louis 1917, Chicago 1920, Tulsa 1921, many more
- Great migration North, away from South
- Red Scare, Palmer raids 1919 – 1920
- Prohibition, 18th Amendment, 1920 – 1932
- Women's rights movement –
  - 19th Amendment - Votes for women1920

THIS man subjected himself to imprisonment and probably to being shot or hanged

THE prisoner used language tending to discourage men from enlisting in the United States Army

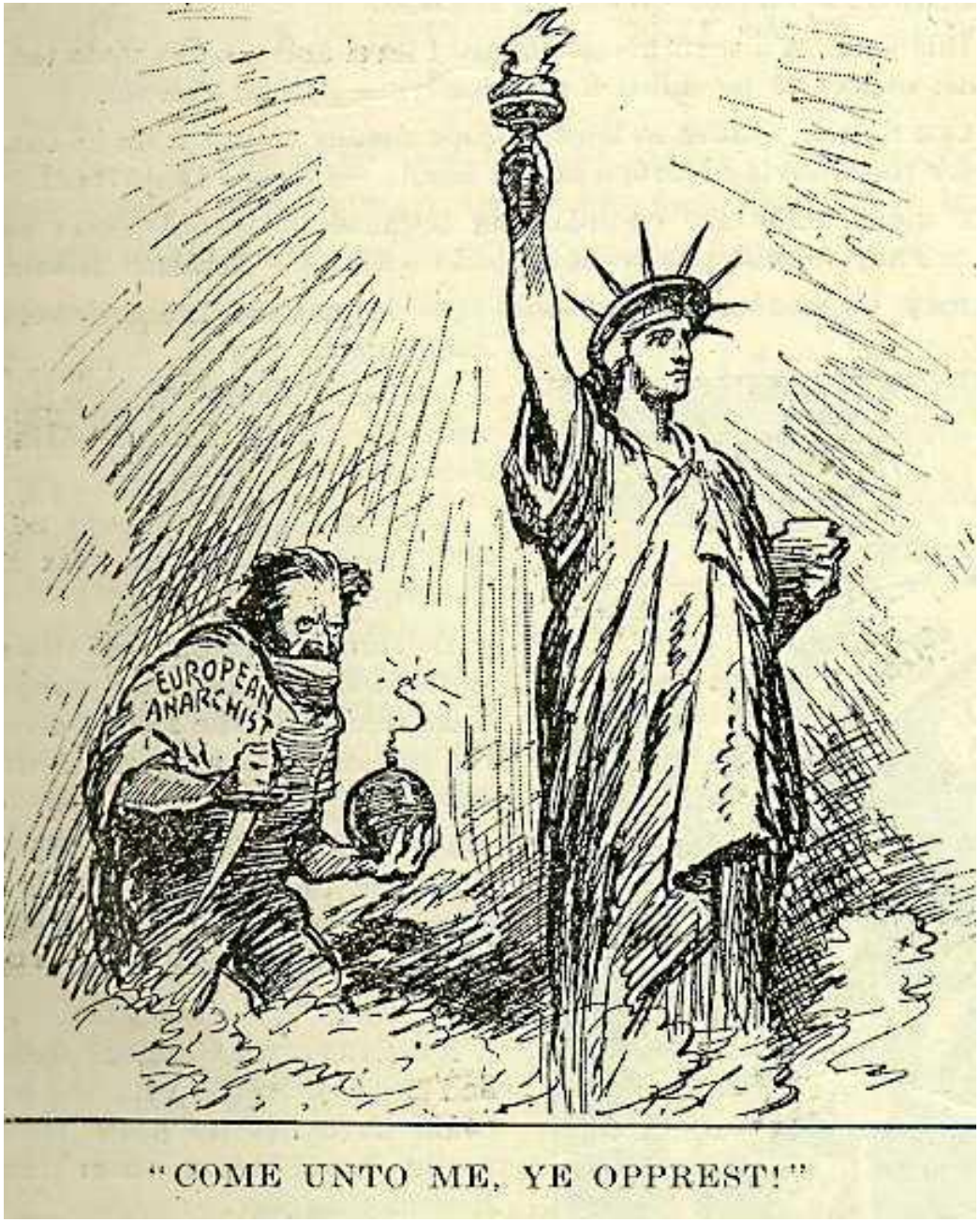
IT is proven and indeed admitted that among his incendiary statements were—

THOU shalt not kill

and

BLESSED are the peacemakers

How the left saw the Red Scare



"COME UNTO ME, YE OPPREST!"

- How the right saw the Red Scare
- 2000 arrests, 1000 con-victions

Chafee & 1st Amendment theory

- **Balancing** — Zachariah Chafee (Brown U.) wrote "Freedom of Speech" (1920) in the context of the WWI Sedition Act, the "Palmer Raids" and especially the Schenck 'clear and present danger' decision of 1919.
- "Advocacy of revolution is [not so] dangerous except in extraordinary times of great tension."

Standards for prior restraint

- Bad tendency test (before 1919)
- Clear & present danger
  - Schenck v US, 1919
  - Upheld in Abrams, Gitlow
  - Whitney v California, 1927
- Imminent Action test
  - Bradenburg v Ohio, 1969
  - Current "controlling" case

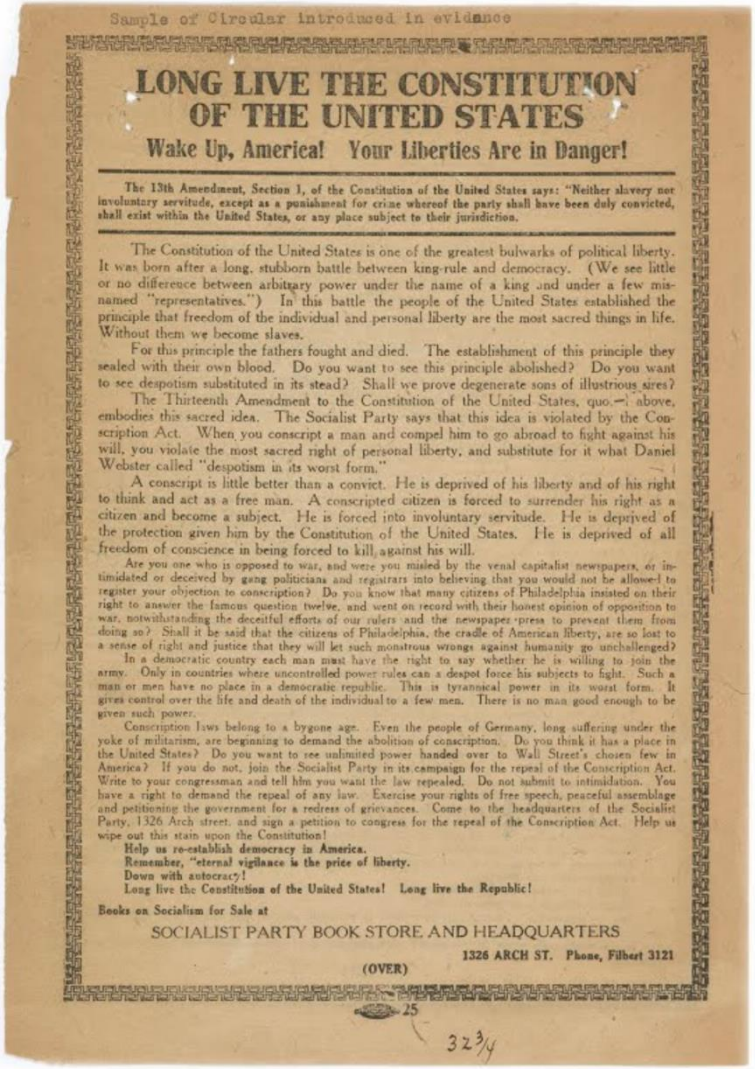
Three cases that set standards

- **Schenck v US,** 1919 – clear & present danger
- **Whitney v California,** 1927 -- no distinction between action & expression
- **Brandenburg v Ohio,** 1968 – "immindent action" standard

1. Schenck 'clear & present danger'

- Set standard for government prior restraint from 1919 to 1968

Charles Schenck's "silly leaflet"



Sample of Circular introduced in evidence

LONG LIVE THE CONSTITUTION OF THE UNITED STATES

Wake Up, America! Your Liberties Are in Danger!

The 13th Amendment, Section 1, of the Constitution of the United States says: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

The Constitution of the United States is one of the greatest bulwarks of political liberty. It was born after a long, stubborn battle between king-rule and democracy. (We see little or no difference between arbitrary power under the name of a king and under a few misnamed "representatives.") In this battle the people of the United States established the principle that freedom of the individual and personal liberty are the most sacred things in life. Without them we become slaves.

For this principle the fathers fought and died. The establishment of this principle they sealed with their own blood. Do you want to see this principle abolished? Do you want to see despotism substituted in its stead? Shall we prove degenerate sons of illustrious sires?

The Thirteenth Amendment to the Constitution of the United States, quoted above, embodies this sacred idea. The Socialist Party says that this idea is violated by the Conscription Act. When you conscript a man and compel him to go abroad to fight against his will, you violate the most sacred right of personal liberty, and substitute for it what Daniel Webster called "despotism in its worst form."

A conscript is little better than a convict. He is deprived of his liberty and of his right to think and act as a free man. A conscripted citizen is forced to surrender his right as a citizen and become a subject. He is forced into involuntary servitude. He is deprived of the protection given him by the Constitution of the United States. He is deprived of all freedom of conscience in being forced to kill against his will.

Are you one who is opposed to war, and were you misled by the venal capitalist newspapers, or intimidated or deceived by gang politicians and registrars into believing that you would not be allowed to register your objection to conscription? Do you know that many citizens of Philadelphia insisted on their right to answer the famous question twelve, and went on record with their honest opinion of opposition to war, notwithstanding the deceitful efforts of our rulers and the newspaper press to prevent them from doing so? Shall it be said that the citizens of Philadelphia, the cradle of American liberty, are so lost to a sense of right and justice that they will let such monstrous wrongs against humanity go unchallenged?

In a democratic country each man must have the right to say whether he is willing to join the army. Only in countries where uncontrolled power rules can a despot force his subjects to fight. Such a man or men have no place in a democratic republic. This is tyrannical power in its worst form. It gives control over the life and death of the individual to a few men. There is no man good enough to be given such power.

Conscription laws belong to a bygone age. Even the people of Germany, long suffering under the yoke of militarism, are beginning to demand the abolition of conscription. Do you think it has a place in the United States? Do you want to see unlimited power handed over to Wall Street's chosen few in America? If you do not, join the Socialist Party in its campaign for the repeal of the Conscription Act. Write to your congressman and tell him you want the law repealed. Do not submit to intimidation. You have a right to demand the repeal of any law. Exercise your rights of free speech, peaceful assemblage and petitioning the government for a redress of grievances. Come to the headquarters of the Socialist Party, 1326 Arch street, and sign a petition to congress for the repeal of the Conscription Act. Help us wipe out this stain upon the Constitution!

Help us re-establish democracy in America.
Remember, "eternal vigilance is the price of liberty.
Down with autocracy!
Long live the Constitution of the United States! Long live the Republic!

Books on Socialism for Sale at

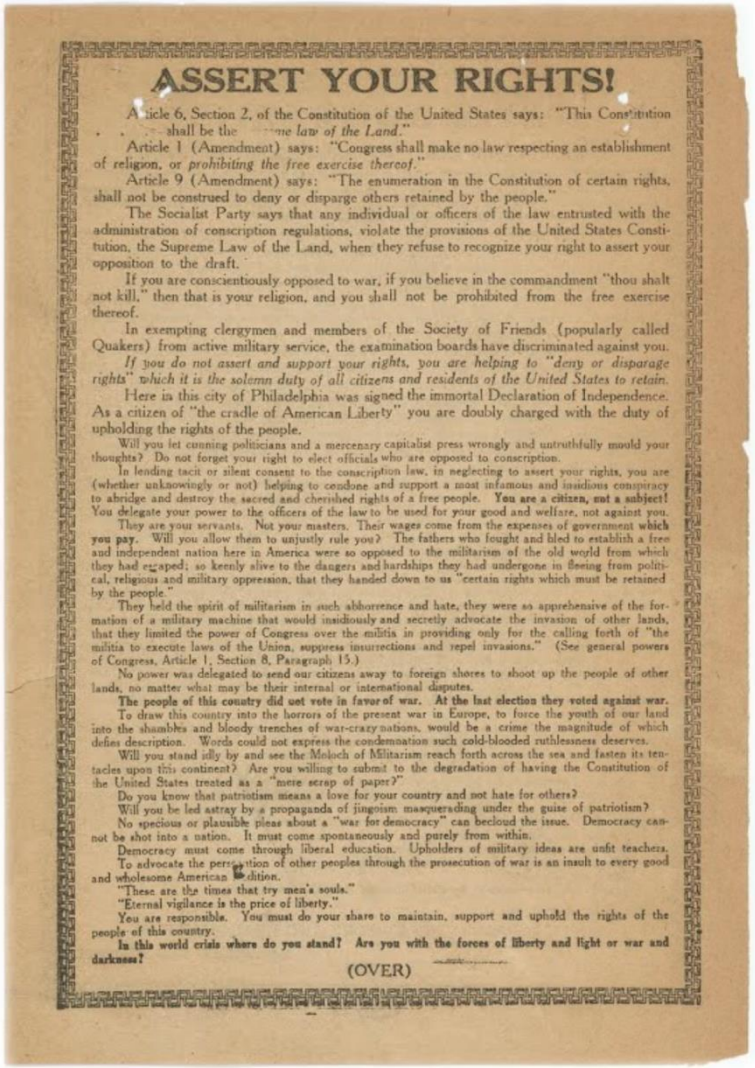
SOCIALIST PARTY BOOK STORE AND HEADQUARTERS

1326 ARCH ST. Phone, Filbert 3121

(OVER)

25

323/4



ASSERT YOUR RIGHTS!

Article 6, Section 2, of the Constitution of the United States says: "This Constitution . . . shall be the supreme law of the Land."

Article 1 (Amendment) says: "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof.*"

Article 9 (Amendment) says: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparge others retained by the people."

The Socialist Party says that any individual or officers of the law entrusted with the administration of conscription regulations, violate the provisions of the United States Constitution, the Supreme Law of the Land, when they refuse to recognize your right to assert your opposition to the draft.

If you are conscientiously opposed to war, if you believe in the commandment "thou shalt not kill," then that is your religion, and you shall not be prohibited from the free exercise thereof.

In exempting clergymen and members of the Society of Friends (popularly called Quakers) from active military service, the examination boards have discriminated against you.

If you do not assert and support your rights, you are helping to "deny or disparage rights" which it is the solemn duty of all citizens and residents of the United States to retain.

Here in this city of Philadelphia was signed the immortal Declaration of Independence. As a citizen of "the cradle of American Liberty" you are doubly charged with the duty of upholding the rights of the people.

Will you let cunning politicians and a mercenary capitalist press wrongly and untruthfully mould your thoughts? Do not forget your right to elect officials who are opposed to conscription.

In lending tacit or silent consent to the conscription law, in neglecting to assert your rights, you are (whether unknowingly or not) helping to condone and support a most infamous and insidious conspiracy to abridge and destroy the sacred and cherished rights of a free people. **You are a citizen, not a subject!** You delegate your power to the officers of the law to be used for your good and welfare, not against you.

They are your servants. Not your masters. Their wages come from the expenses of government **which you pay.** Will you allow them to unjustly rule you? The fathers who fought and bled to establish a free and independent nation here in America were so opposed to the militarism of the old world from which they had escaped; so keenly alive to the dangers and hardships they had undergone in fleeing from political, religious and military oppression, that they handed down to us "certain rights which must be retained by the people."

They held the spirit of militarism in such abhorrence and hate, they were so apprehensive of the formation of a military machine that would insidiously and secretly advocate the invasion of other lands, that they limited the power of Congress over the militia in providing only for the calling forth of "the militia to execute laws of the Union, suppress insurrections and repel invasions." (See general powers of Congress, Article 1, Section 8, Paragraph 15.)

No power was delegated to send our citizens away to foreign shores to shoot up the people of other lands, no matter what may be their internal or international disputes.

The people of this country did not vote in favor of war. At the last election they voted against war.

To draw this country into the horrors of the present war in Europe, to force the youth of our land into the shambles and bloody trenches of war-crazy nations, would be a crime the magnitude of which defies description. Words could not express the condemnation such cold-blooded ruthlessness deserves.

Will you stand idly by and see the Moloch of Militarism reach forth across the sea and fasten its tentacles upon this continent? Are you willing to submit to the degradation of having the Constitution of the United States treated as a "mere scrap of paper?"

Do you know that patriotism means a love for your country and not hate for others?

Will you be led astray by a propaganda of jingoism masquerading under the guise of patriotism?

No specious or plausible pleas about a "war for democracy" can becloud the issue. Democracy cannot be shot into a nation. It must come spontaneously and purely from within.

Democracy must come through liberal education. Upholders of military ideas are unfit teachers.

To advocate the perpetuation of other peoples through the prosecution of war is an insult to every good and wholesome American tradition.

"These are the times that try men's souls."

"Eternal vigilance is the price of liberty."

You are responsible. You must do your share to maintain, support and uphold the rights of the people of this country.

In this world crisis where do you stand? Are you with the forces of liberty and light or war and darkness?

(OVER)

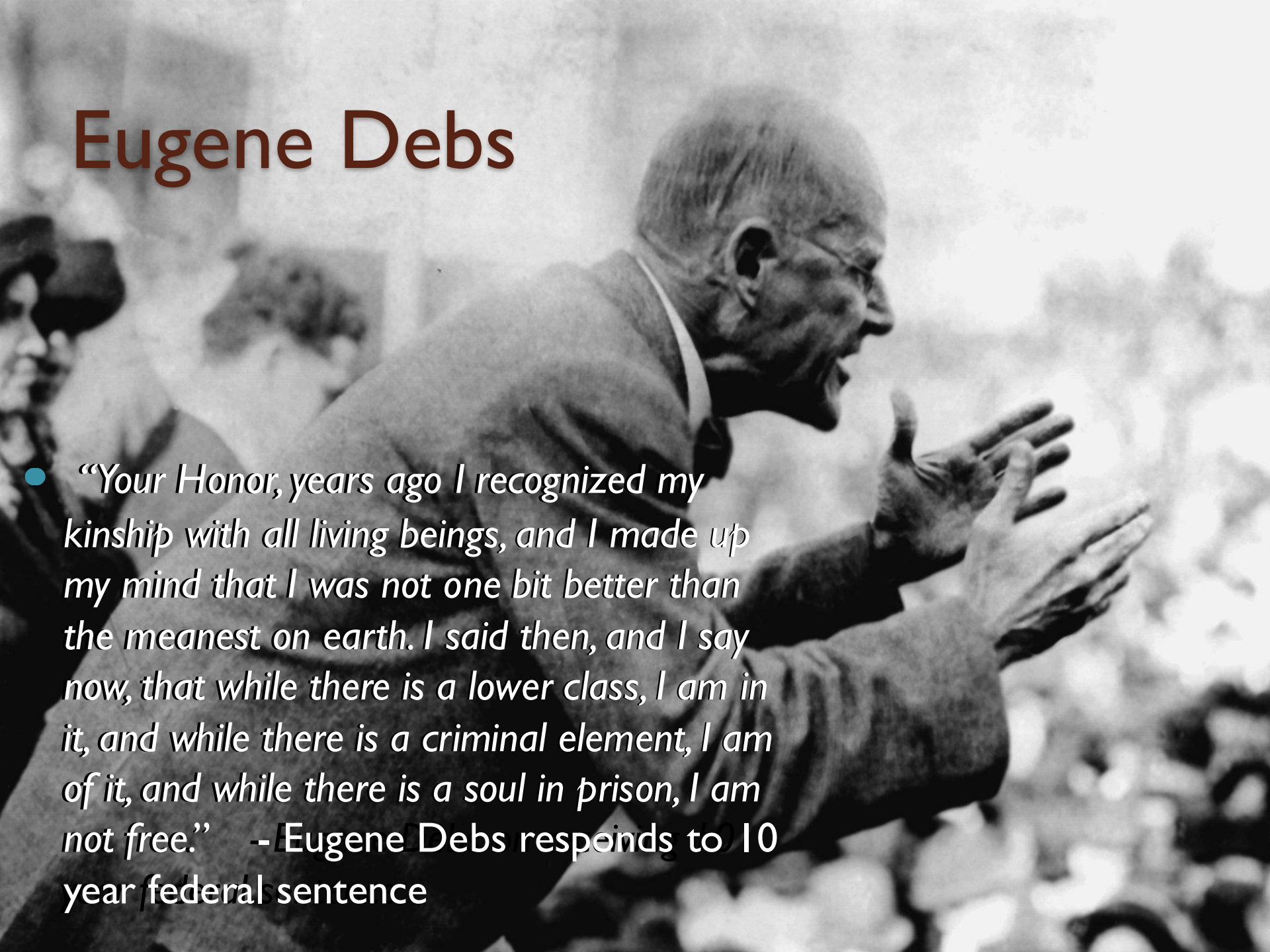
WWI - Shenck v US – 1919

- Facts: Charles Schenck – Socialist party Philadelphia mails pamphlet to 15,000 draft-age men comparing draft to slavery
- Arrested under 1917 Espionage Act and conviction is upheld by Supreme Court
- Issue: How much can government suppress dissent?
- Rule: Clear and present danger test
  - Like"shouting fire in a crowded theater"

WWI - Shenck v US – 1919

- Analysis:
  - Clear and present danger test evolved from previous bad tendency test
  - Effect was to make it easier to suppress dissent even in times of peace
- Conclusion:
  - Unpopular, non-violent ideas should also be protected, but were not until …
  - Schenck decision overturned by Brandenburg "imminent action" test in 1968

Eugene Debs



- *"Your Honor, years ago I recognized my kinship with all living beings, and I made up my mind that I was not one bit better than the meanest on earth. I said then, and I say now, that while there is a lower class, I am in it, and while there is a criminal element, I am of it, and while there is a soul in prison, I am not free."* -- Eugene Debs responds to 10 year federal sentence

Eugene Debs

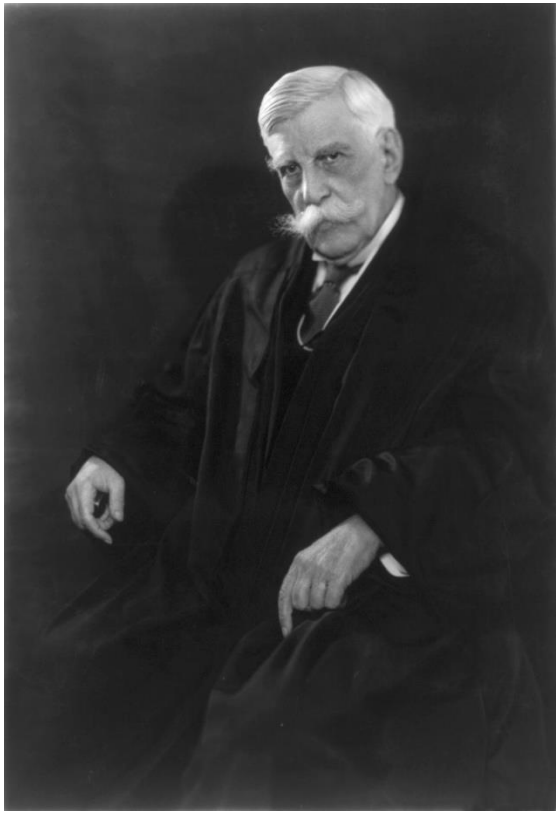
- Socialist President speaks out against draft
- Sentenced to 10 years in 1918
- Upheld under Schenck ruling
- Sentence commuted Dec. 1921 by President Harding
-

More Early 1st Amendment cases

- Abrams v US 1919 – Denounced sending US troops to fight Russian revolutionaries. First dissent – leaflets didn't pose a Clear & Present Danger
- Gitlow v New York 1925 – Benjamin Gitlow jailed for writing "Left Wing Manifesto"
  - Court said states must protect freedom of speech, but upheld Gitlow's conviction & 5-10 year jail sentence.

Famous Supreme Court Dissents

- Abrams v US 1919: Oliver Wendell Holmes: "Congress certainly cannot forbid all effort to change the mind of the country … Nobody can suppose that … a silly leaflet by an unknown man, would present any immediate danger …"



2. Whitney v California, 1927

Charlotte Anita Whitney arrested in Oakland, California in November 1919 after giving a speech supporting the I.W.W.

She was charged with "criminal syndicalism" for helping establish the state's Communist Labor Party.

MISS WHITNEY GRANTED PARDON IN CALIFORNIA

Social Worker Was Convicted Under Syndicalism Act; 7-Year Fight Ends.

LOST IN SUPREME COURT

Sacramento, Calif., June 20 (By A. P.).—Charlotte Anita Whitney, Oakland social worker, today was saved from a one to fourteen year term in San Quentin prison for violating the California criminal syndicalism act, winning a complete pardon from Gov. C. C. Young.

The governor's decision, announced after several weeks of studying the records of the case from the Alameda County Superior Court to the United States Supreme Court, where her conviction was upheld on May 26, ended a fight of more than seven years to keep Miss Whitney out of prison.

Miss Whitney was arrested in Oakland in November, 1919, when she defied authorities and delivered a speech in that city on behalf of John McHugo, accused I. W. W. leader. She was found guilty.

A country-wide movement was inaugurated to secure her release after the United States Supreme Court refused her appeal. A petition signed by many prominent persons in all walks of life was presented to Gov. Young.

He gave as among his reasons for the issuance of the pardon:

"Because I do not believe that under ordinary circumstances this case would ever have been brought to trial.

"Because the abnormal conditions attending the trial go a long way toward explaining the verdict of the jury.

"Because I feel that the criminal syndicalism act was primarily intended to apply to organizations actually known as advocates of violence, terrorism, or sabotage, rather than to such organizations as a Communist Labor Party.

"Because the judges who have been connected with the case as well as the authors and some of the strongest advocates of the law under which Miss Whitney was convicted unite in urging that a pardon be granted."

Charlotte Anita Whitney Dies; Socially Prominent Communist

Mayflower Descendant Was California Party Treasurer, Candidate for Senator

Special to The New York Times.

SAN FRANCISCO, Feb. 4—Miss Charlotte Anita Whitney, a socially prominent Californian who served for many years as treasurer of the Communist party in the state and ran unsuccessfully as the party's nominee for United States Senator, died at her home here today. She was 87 years old.

Miss Whitney was the daughter of George E. Whitney, a Mayflower descendant who served in the State Senate in the Eighteen Eighties. Her uncles included Stephen J. Field, who was appointed to the Supreme Court by President Lincoln, and Cyrus W. Field, sponsor of the first trans-Atlantic cable.

A graduate of Wellesley College, Miss Whitney began a career as a social worker after a visit to New York's East Side. Returning to Oakland, she devoted herself to the problems of juvenile delinquency, militantly advocated universal suffrage and in 1914 joined the Socialist party.

She began to make newspaper headlines in 1919 as a result of a speech on the Negro problem at the Oakland Center of the California Civic League, of which she was a former president. A result was her arrest, trial and conviction under California's syndicalism law.

Miss Whitney was sentenced to a term of one to fourteen years in San Quentin. The case finally reached the Supreme Court, which ruled it lacked jurisdiction. Miss Whitney eventually was pardoned by Gov. C. C. Young after his predecessor, Gov. Friend W. Richardson, had turned down petitions to that end. She did not actually go to prison.

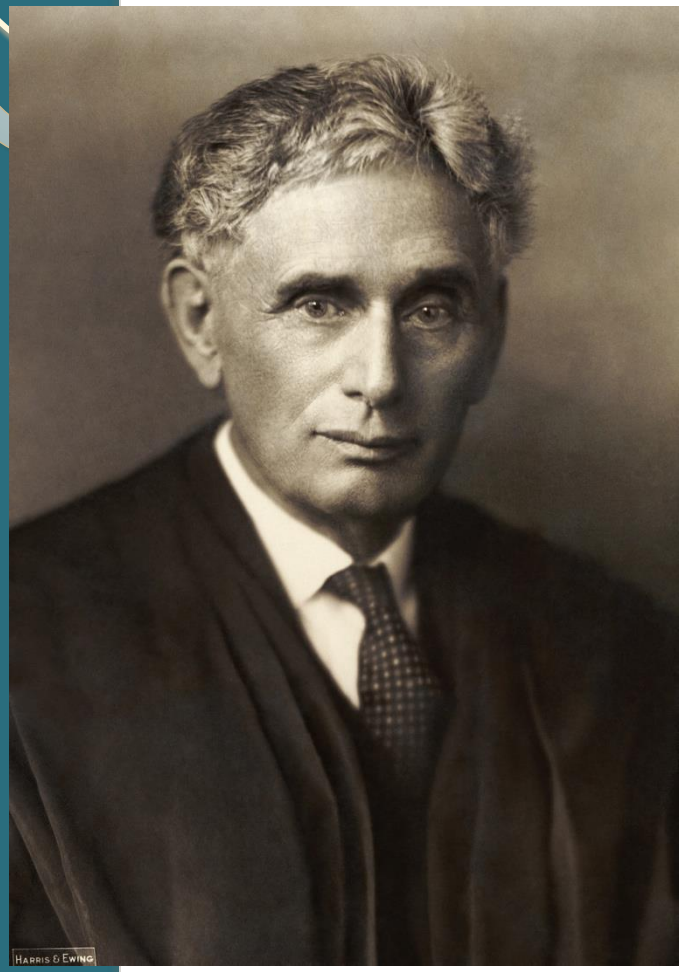
Associated Press, 1934
Miss Charlotte A. Whitney

In 1935, Miss Whitney was convicted of distributing radical literature, lecturing without a permit and falsely attesting signatures to Communist election petitions. She had a choice of paying a $600 fine or serving 300 days in jail. She decided on the jail term, but a nephew paid the fine before she could enter a cell.

As Anita Whitney, she ran on the Communist party ticket at various times for county supervisor, state controller, representative in Congress and Senator.

Friends said she left a younger sister in New Jersey.

Famous Supreme Court Dissents



- Whitney v California 1927, Justice Louis Brandeis dissented from this trend. He didn't think it was right to uphold a state conviction of a woman who was simply a member of the Communist Party (continued)

Whitney dissent (Brandeis)

- "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty…. No danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. .."

3. Brandenburg v Ohio, 1969

- Clarence Brandenburg (left) speaks at a KKK rally near Cincinnatti, Ohio summer of 1964
  - Richard Hanna, Nazi, right
- Brandenburg calls for "revengance" against Jews and blacks, saying that the government oppresses white people
- Sentenced to 1 – 10 years in prison
- AP photo / Educational – Fair Use

End of Clear & Present Danger

- **Brandenburg v Ohio** standard is current controlling case
- Only when someone is inciting or producing "imminent lawless action" can government stop speech
- Court relied on **Whitney** and **Abrams** dissents and overturned the 1919 **Schenck v US** "clear and present danger" standard.

The First Amendment protects "advocacy of the use of force … except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

Was Jan 6 speech incitement to imminent action ?

- Trump riled up a mob a short walk from the Capitol right before Congress was scheduled to count the certified electoral votes. Both in his tweets calling on supporters to come to Washington and in his speech at the Washington rally, the president falsely stated that allowing Congress to count the certified electoral votes would "steal" the election from him and his followers.

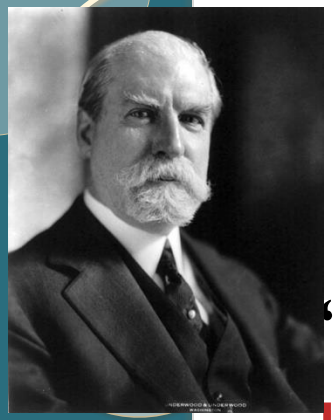
Three press censorship cases

- Near v Minnesota, 1933
  - A state (Minn.) can't ban a publication
- Trinity v Federal Radio Comm., 1933
  - FCC can pull a radio station license
- US v New York Times, 1972
  - Secret history of the Vietnam war can be published

J.M. Near

- The Saturday Press, Twin Cities reporter, constant stream of wild charges and racism.
- State of MN bans publication in 1925
- The MN state supreme court upholds the state ban, saying that the Constitution "was never intended to protect malice, scandal and defamation when untrue or published with bad motives or without justifiable ends…"
- This state decision did not stand. Near challenged the law under the First and Fourteenth Amendments. In overturning the Minnesota court, the US Supreme Court said:

- Each issue … followed a set pattern…
- Sex, attacks on public officials and prominent private citizens, and vicious baiting of minority groups ...
- Three- or four-inch headlines, revealing a new sex scandal, screamed from every page.
- "Smooth Minneapolis Doctor with Woman in Saint Paul Hotel," or "White Slaver Plying Trade: Well Known Local Man Is Ruining Women and Living off Their Earnings."



Near v Minnesota, US decision

"The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with Constitutional privilege." -- US Justice Charles Evans Hughes

Near v Minnesota 1931

The Saturday Press

Vol. 1. No. 4 — Minneapolis, Minn., Oct. 15, 1927 — Price 5 Cents

A Direct Challenge to Police Chief Brunskill

The Chief, in Banning This Paper from News Stands, Definitely Aligns Himself With Gangland, Violates the Law He Is Sworn to Uphold, When He Tries to Suppress This Publication. The Only Paper in the City That Dares Expose the Gang's Deadly Grip on Minneapolis. A Plain Statement of Facts and a Warning of Legal Action.

Possibly there are moments when "a soft answer turneth away wrath" but as against such short periods there are

news stands FOR WE HAD BEEN TOLD BY THE GANGSTER SYNDICATE THAT CHIEF OF POLICE BRUN-

Respectfully Submitted

There seems to be an impression among gentlemen of peculiar bent that the suppression of our street sales has rendered abortive our attempt to cleanse this city of gang rule. These gents are intellectual single-trackers; twenty - ten caliber cops rotting around in a four hundred thousand city. Lest they become too bilious, I beg to call their attention to the following letter, the

testify before your body he would be more than glad to give you sufficient evidence upon which to base an indictment of the acknowledged gang-leader, Klein Barnett— the man who threatened Mr. Shapiro just a comparatively few days before the assault upon his person and property was made by four gunmen.

The article as published, stands unchallenged by either

Contrast with broadcasting

- **Trinity Methodist Church v. FRC, 1933** — A Los Angeles church had a radio license
  - Anti-Semitism & fascist propaganda
- Similar case: Dr. John Brinkley KFKB advocating medically fraudulent implants of supposedly rejuvenating animal organs. FCC broadcast license 1930

- Father Charles Coughlin – FCC rules prohibited single speaker for ongoing shows in 1930s / evolved into "Fairness Doctrine"

- **New York Times v US**, 1971 -- President Nixon tried to stop publication of the "Pentagon Papers" but failed

New York Times

NEW YORK, SUNDAY, JUNE 13, 1971

ISCLOSE
RY TRIES
ARTMENTS

Make Decision
es Scheduled
nced Today

Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U. S. Involvement

By NEIL SHEEHAN

Three pages of documentary material from the Pentagon study begin on Page 35.

Though far from a complete history, even at 2.5 million words, the study forms a great archive of government decision-making on Indochina over three decades. The study fell its 30 to 40 vo-

What the Kennedy Administration, though ultimately spared from major escalation decisions by the death of its leader, transformed a policy of "limited-risk gamble," which it inherited, into a "broad commitment" that left President Johnson with a choice between more war and withdrawal.

What the Johnson Administration, though the President was reluctant and

NY Times v US 1971

- The papers had been leaked to reporters by Daniel Ellsberg, a Pentagon consultant.
- First Amendment advocates worried about what the court would do without Chief Justice Berger (who died in 1969)
- The Court said the government had a heavy burden to prove there was a national security issue, and had failed to meet it. Court orders halting publication of the papers were lifted.

Part II

- Compelled speech & right of association
- Symbolic speech
- Hate speech
- Obscenity

Compelled speech – William Tell

Forced to salute?

- In the US, compelled speech issues and related "free exercise of religion" issues has come up many times, often in cases involving Jehovah's Witnesses
- Can students in a public school be forced to salute the US flag? Court said yes in a 1940 case but reversed in **West Virginia State Board of Education v Barnette, 1943**.
- *"If there is any fixed star in our constitutional constellation, it is that* ***no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,*** *or force citizens to confess by word or act their faith therein."*

Compelled speech and right of association

- NAACP v Alabama, 1958
- State asked for business and membership records; NAACP provided business records but refused member records
- The Supreme Court unanimously ruled that the First Amendment protected the free association rights of the National Association for the Advancement of Colored People (NAACP) and its rank-and-file members

Compelled speech and right of association

- NAACP v Alabama, 1958
- Justice John Marshall Harlan II wrote: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."

Compelled speech and right of association

- **Hurley v. Irish American gay lesbian and bisexual group of Boston,** 1995 Veterans groups have a right of association, and can decide whom they will include in their St. Patricks day parade.
- Gays have right to parade, too, and can exclude veterans if they like. To deny a right of association would be akin to forced speech, the court said.
- Similar to Boy Scouts of America v Dale, 2000 – Scouts can exclude gays

Anonymous speech cases

- **McIntyre v. Ohio, 1995** -- Ohio statute that prohibits anonymous political or campaign literature is unconstitutional.
- **Doe v. Reed, 2010** -- Disclosure of signatures on a referendum is not unconstitutional. Anti-gay rights group didn't want to be individually identified in WA state.

Political speech

- **Citizens United v. FEC, 2010**
  - First Amendment allows no limits on campaign contributions
  - Struck down McCain–Feingold Act that prohibited all corporations and unions from broadcasting "electioneering communications."
  - Case involved a video of Hilary Clinton produced by conservatives

Symbolic speech

- Symbolic speech consists of nonverbal, nonwritten forms of communication, such as flag burning, wearing arm bands, and burning of draft cards. It is generally protected by the First Amendment unless it causes a specific, direct threat to another individual or public order. (First Amendment Encyclopedia)
- Tinker v Des Moines (arm bands), 1969
  - Note Hazelwood v Kuhlmeier, 1988
- US v O'Brien (draft cards)
- Texas v Johnson (flag burning)

Tinker v Des Moines School District, 1969

Mary Beth Tinker and armband, with her mother.

Tinker v Des Moines, 1969

- John and Mary Beth Tinker were suspended for wearing a black arm band protesting the Vietnam War
- Court says schools would have to demonstrate constitutionally valid reasons such as a "substantial disruption" of the educational process
- *It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. ...*

Hazelwood v Kuhlmeier, 1988

- The court ruled that schools can restrict speech in school-sponsored activities if it's for a legitimate educational reason.
- The ruling overturned Tinker
- About 1/3 states still use the Tinker standard for high school
- FIRE – Foundation for Individual Rights in Education
- Student Press Law Center

US v O'Brien 1968

- Action vs expression
- David O'Brien burned a draft card on the steps of a Boston Mass courthouse. He was arrested for violating a law forbidding the destruction of draft cards. Was that a violation of his First Amendment rights?
- The court said no, it was not a violation. Such laws are constitutional if they are pass a strict scrutiny test

O'Brien test / strict scrutiny

1) Within the constitutional power of the government

2) further an important or substantial government interest

3) Interest must be unrelated to the suppression of speech (must be "content neutral"), and

4) prohibit no more speech than is essential to further that interest (not "overly broad")

O'Brien case

- If a regulation prohibits conduct that combines "speech" and "nonspeech" elements, then a governmental interest in regulating the non-speech element "can justify incidental limitations on First Amendment freedoms"
- US Government had a "compelling interest" in prohibiting draft card burning

Symbolic speech, like Tinker

- Texas v Johnson, 1989
- Gregory Johnson, burns US flag at the 1984 Republican convention
- Although "the government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word," it may not "proscribe particular conduct because it has expressive elements."

Scrutiny in First Amendment cases

- Content-based laws
  - strict scrutiny
  - symbolic speech is content
  - government must have a compelling reason to regulate
- Content-neutral laws
  - time/place/manner laws OK
  - intermediate scrutiny

Hate speech & the law


Genocide
The act or intent to deliberately and systematically annihilate an entire people
Bias Motivated Violence
Murder, Rape, Assault, Arson, Terrorism, Vandalism, Desecration, Threats
Discrimination
Economic discrimination, Political discrimination, Educational discrimination, Employment discrimination, Housing discrimination & segregation, Criminal justice disparities
Acts of Bias
Bullying, Ridicule, Name-calling, Slurs/Epithets, Social Avoidance, De-humanization, Biased/Belittling jokes
Biased Attitudes
Stereotyping, Insensitive Remarks, Fear of Differences, Non-inclusive Language, Microaggressions, Justifying biases by seeking out like-minded people, Accepting negative or misinformation/screening out positive information

Hate Speech

- **Hate speech**, according to the American Bar Association, is speech that offends, threatens, or insults groups, due to their race, color, religion, national origin, sexual orientation, disability, or other traits.
- Current US law concerning hate speech differs greatly from Europe and much of the world.
  - Marketplace of ideas theory
  - Group libel theory
  - Speech – Action / feminist theory

Marketplace of ideas

- Generally, the US allows almost all hate speech under the marketplace of ideas theory of First Amendment protection until there is "imminent lawless action."
- There is also an underlying hope that hate speech will be discouraged informally through social reactions.

Group libel & hate speech

- One way to look at hate speech is that it can be libel (defamation) of a whole group. For a time, US law recognized libel for groups of people, and held that representatives of those groups recover for (and stop) the libel.
- In a 1952 case, Beauharnais v Illinois, the US Supreme Court said yes, that anti-negro pamphlets depicting "… depravity, criminality, unchastity or lack of virtue of citizens of Negro race and color …" could be punished by a state law.
- In NYT v Sullivan, 1964, this approach was abandoned because plaintiffs had to be clearly identified as individuals.

Speech-Action theory

- Mary Kate McGowan -- Words and symbols lead to action
- Authorities can alter the social location or life experience of others with demeaning or derogatory words.
- Catharine A. MacKinnon -- pornography, as speech, is inherently violent to women because it silences and subordinates them.
- (American Booksellers v Hadnut, 1987)

Paradox of Tolerance

- Karl Popper: "Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them."

Social Justice – Rawls

John Rawls on the other hand argued in *A Theory of Justice* that a just society must tolerate the intolerant. But he agrees with Popper to some extent, that society's self-preservation is more important than the principle of tolerance:

"While an intolerant sect does not itself have title to complain of intolerance, its freedom should be restricted only when the tolerant sincerely and with reason believe that their own security and that of the institutions of liberty are in danger."

Hate speech: European laws

- Laws in Europe and most other countries in the world punish hate speech and prohibit display and sale of the symbols of hatred. In Europe, and the primary justification is the continent's history of genocide.
- Religious tolerance is part of international law under the UN Declaration of Human Rights Article 2 and 26.
- However, the suppression of hate speech is justified by some civil law systems that don't put individual rights at the heart of their legal system.

Hate speech: European laws 2

- *Volksverhetzung* law in Germany punishes incitement of hatred against national, racial or religious groups
- Specifically prohibits disturbing the peace or calling for acts of violence or maliciously attacking human dignity
- ECRI – European Commission against Racism and Intolerance – Annual reports, investigations

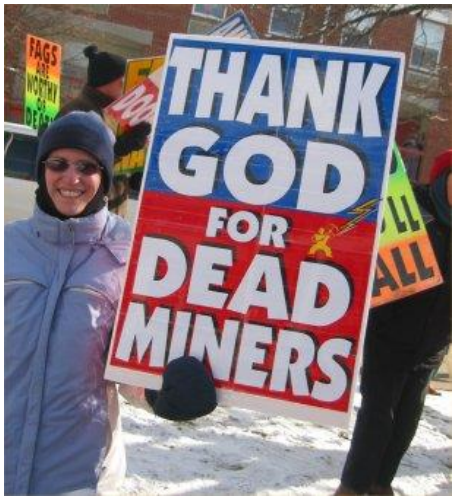
Early US hate speech case

- "Fighting words" might produce lawless action -- Chaplinsky v New Hampshire, 1942.
- Chaplinsky was cited for a breech of peace for calling a policeman "a damned fascist." The US Supreme Court said that since the words could lead to violent action, the state law was Constitutional.
- So it was permissible to arrest someone for calling a policeman a fascist because the words could lead to violence.
- Mostly overturned in RAV v St. Paul

More hate speech cases

- **RAV v. St Paul,** 1992 — An ordinance banned burning crosses, displaying swastikas or expressing religious or racial hatred. Some in the court said the city had plenty of ways to punish cross burners without an overly broad ordinance. The majority said that the fighting words doctrine cant be used to limit hate speech, and more or less overturned Chaplinsky.
- **Virginia v. Black**, 2003 –A Virginia state law that bans cross-burning is (as in RAV) a violation of free speech rights, but if the cross is burned with the intent to intimidate, a state law to prevent it is NOT unconstitutional.

More hate speech



Snyder v Phelps, 2011, in which the court said that the Westboro Baptist Church protests at funerals were not punishable under the "intentional infliction of emotional distress" statute.

US v Alvarez, 2012

The court struck down a law punishing a person for falsely claiming they had been awarded a military medal

Truckers "freedom" rally 2022

- Swastikas and Confederate flags on display in Ottawa in Feb. 2022 have led to proposals to ban both in Canada's Parliament.

Obscenity

- Warning:
- We are not viewing explicit images in class (of course)
- but
- There may be a few uncomfortable issues raised

What is obscenity?

- Obscenity v indecency
- Lewd, filthy, disgusting words or pictures
- But there are major disagreements about:
  - Defining obscenity
  - Defining government role
  - Assessing social harm
- Inconsistent application of law
- Irregular history, state vs federal laws
- Patchwork regulation, varies from town to town and state to state

Virginia vs Radford Va

THE NEW RIVER CITY
RADFORD
VIRGINIA

What is obscenity?

- Controlling case: Miller v California 1973
- *"… considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse*
- *and which goes substantially beyond customary limits of candor in description or representation of such matters*
- *and which, taken as a whole, does not have serious literary, artistic, political or scientific value."*

To begin with …

- Pornography is found in Chinese cave carvings, Hindu temples, ancient Greek amphora, Japanese prints, all created hundreds and thousands of years ago
- Writing about human sexuality has an long history as well, going back to Medieval Europe
- Ecclesiastical (church) courts jurisdiction until the Protestant Reformation

Progress of a Divine 1735

- Richard Savage acquitted of obscenity after poem about predatory priest
  - Rape, fraud, abortion
- Obscenity was criminal when it was intended to promote the practice of vice; but Savage "only introduced obscene ideas with the view of exposing them to detestation, and of amending the age by showing the deformity of wickedness."

Fanny Hill

- 1748 John Cleland publishes
- 1749 arrested and charged with "corrupting the King's subjects"
- Book withdrawn but pirate copies circulate
- Banned in Massachusetts 1821
- (First legally published in 1963 …
  - After *Lady Chatterley's Lover* trial 1960 in UK)

J. June, Inv. Sculp.

HARRIS's LIST

OF

Covent-Garden Ladies:

OR

MAN OF PLEASURE's

KALENDAR,

For the YEAR 1773.

CONTAINING

An exact Deſcription of the moſt celebrated Ladies of Pleaſure who frequent COVENT-GARDEN, and other Parts of this Metropolis.

LONDON:

Printed for H. RANGER, Temple-Exchange Paſſage, Fleet-Street.

MDCCLXXIII.

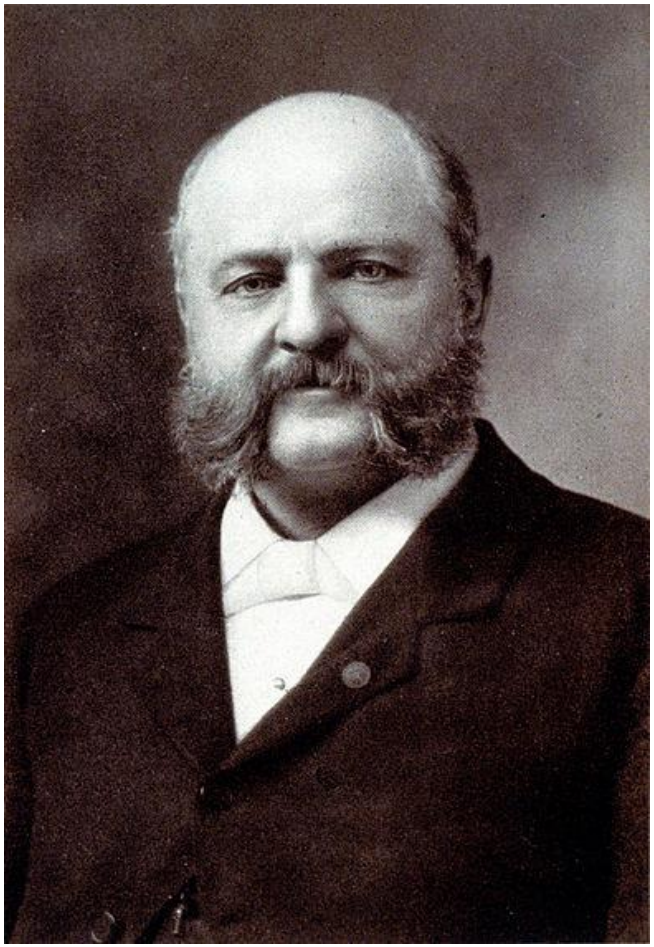

PARIS — Le Moulin Rouge

Landmark Victorian case 1868

- Regina (the Queen) v Benjamin Hicklin
- "The Confessional Unmasked" by Henry Scott (about depravity of Catholics)
- Court: *It is quite clear that the publishing an obscene book is an offence against the law of the land.*
- *Hicklin rule:* Material obscene if any part had a tendency to deprave those whose minds are open to such influences, regardless of intent or merits

US Comstockery

- Post Civil-War reform movement
- In 1873, Anthony Comstock gets Congress to pass a "decency" bill



Becomes US Postal Service agent and arrests thousands

Comstock burned 15 tons of books

- Whitman's Leaves of Grass (in 1882);
- Bocaccio's The Decameron
- Rabelais' Gargantua and Pantagruel (Renaissance era books banned in 1903);
- Elinor Glyn's Three Weeks (in 1907) …
- Tried to close down a George Bernard Shaw play
- Shaw said he was "the world's standing joke at the expense of the United States"

ST. ANTHONY COMSTOCK, THE VILLAGE NUISANCE.

Fighting smut 1800s, early 1900s

- Attacks on women's rights (Nast cartoon)
- NY Society for Suppression Vice
- Boston Watch and Ward Society

Margaret Sanger

- Prosecuted for publishing birth control information under the Comstock Act in 1914
- Fled to England for 2 years
- Opened clinic in Boston, repeatedly arrested
- By 1918 laws relax a little
- Helps start Planned Parenthood

H.L. Mencken – Baltimore Sun

- Editor of short story *"Hatrack"* in American Mercury magazine 1926
- Arrested by Henry Chase of the Boston Watch and Ward Society at "Brimstone Corner" on Boston Commons

Acquitted the next day by Boston judge in a small victory for freedom of press

Film censorship

- Mutual Film v Ohio Industrial Commission 1915 Supreme Court opinion: movies have no First Amendment protection
- State level censorship begins

Like other states, the Virginia State Board of Censors prescreened every movie. They could license it, ban it entirely or require the filmmaker to delete scenes or dialogue thought to be “obscene, indecent, immoral, inhuman, or is of such a character that its exhibition would tend to corrupt morals or incite to crime.”

The board rejected many of the films made by Roanoke, Va. director Oscar Micheaux for depicting race riots and the ”blurring of racial lines.” He moved to California.

Film censorship (con't)

- MPPC (Hays Code) established 1934 to avoid piecemeal state standards.
- Prohibited sex, race, crime, making fun of religion, even film about Nazi death camps before WWII.
- Burstyn v Wilson 1952, US Supreme Ct strikes down church-backed ban on The Miracle (Roberto Rossolini), said film is protected by First Amendment.

US v One Book Entitled Ulysses 1933

- James Joyce 1922
- Attacked as obscene and blasphemous
- Federal judge: Not most susceptible but average person
- Whole context

In effect the Hicklin Rule is abolished in the US at the federal level.


Howl obscenity trial 1957

Howl obscenity trial 1957

- Allen Ginsburg and Lawrence Ferlinghetti up on state obscenity charges for publication of the long poem: "Howl."
- Highly charged San Francisco courtroom
- (2010 film starting James Franco)
- Not guilty under the Roth standard – Separate federal case that same year

Allen Ginsburg

HOWL

I saw the best minds of my generation destroyed by madness,
starving hysterical naked,
dragging themselves through the negro streets at dawn looking for an angry fix;
Angel-headed hipsters burning for the ancient heavenly connection
to the starry dynamo in the machinery of night…

Roth v US, 1957

- NY bookstore owner and poet Samuel Roth charged with federal obscenity
- US Supreme Court hears appeal
- New standard: ***"Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."***

Miller v California 1973

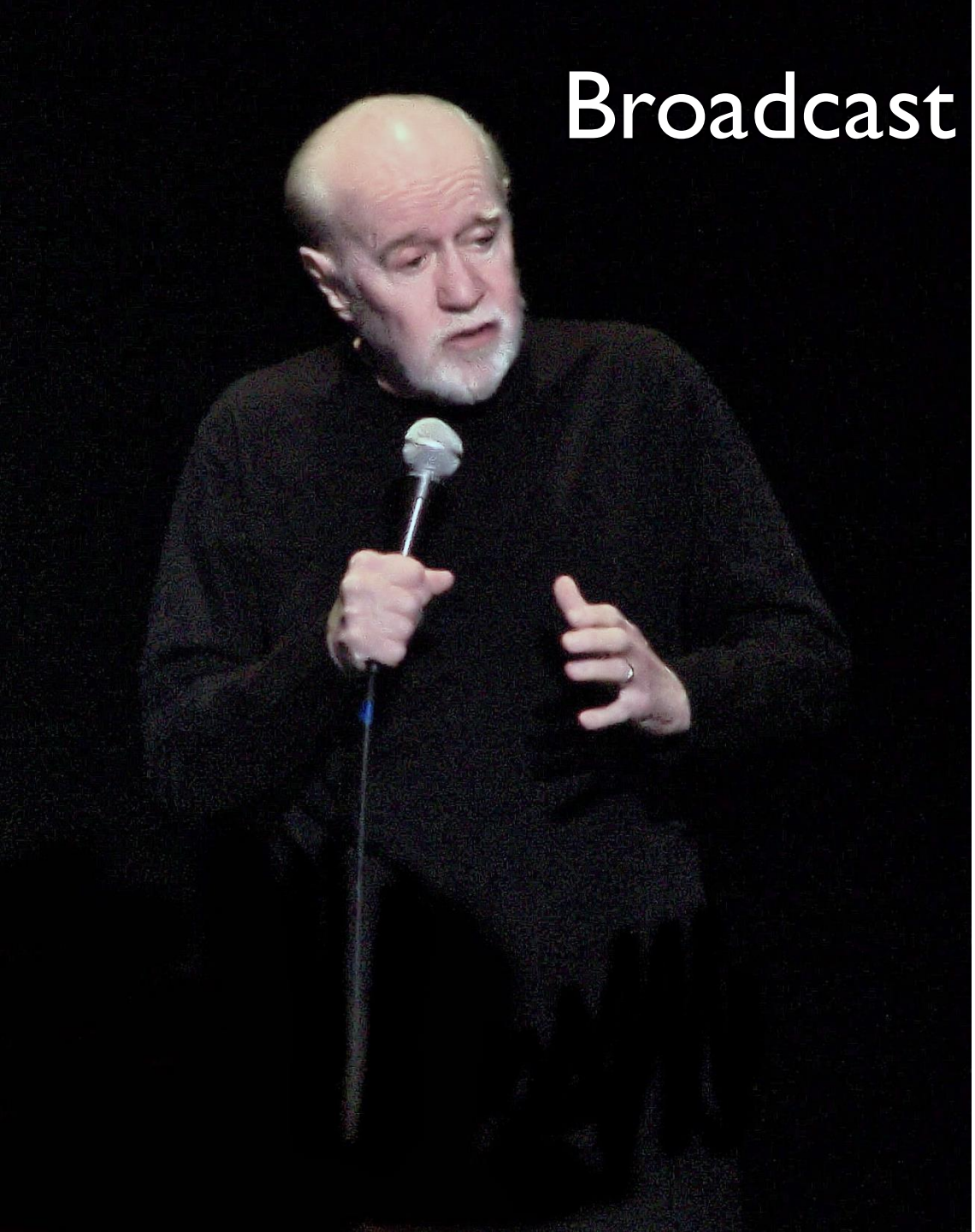
- Community standards replaced national standards
- Obscenity = Roth Test plus
- Describes sexual conduct in a **patently offensive** way; and
- Taken **as a whole, lacks serious literary, artistic, political or scientific value**

Pope v Illinois 1987

- Attendants at two bookstores in Rockford, Illinois charged with state obscenity statute
- Jury instructed to determine whether the magazines were obscene under Miller community standards test
- Artistic or literary value isnt just local community standards
- Prominent in Flynt v Falwell oral argument

American Booksellers v Hadnut, 1985

- Anti-porn law in Indianapolis struck down by courts in 1985
- "Pornography" defined "the graphic sexually explicit subordination of women ... as sexual objects who enjoy pain or humiliation; or who experience sexual pleasure in being raped; or who are … physically hurt, or as dismembered … presented as objects for… violation…"



Broadcast indecency

- FCC v Pacifica 1977
- George Carlin "Seven Dirty Words"
- Led to FCC "safe harbor" regs – indecency OK after 10 pm

Broadcast indecency 2

- In 2009 the Court said the FCC could rule that a single ("fleeting") expletive is indecent under FCC v. Pacifica Foundation
- In 2012 the Court said the FCC rules were too vague but did not address Constitutional issues.

Reno v ACLU 1997

- Court strikes down 1996 Communications Decency Act
- As an unconstitutional attempt to control communications on the Internet.
- Internet and the World Wide Web have full First Amendment protection, such as the print media, and should not be regulated like radio and television broadcasting.

Obscenity cases recap

- Regina v Hicklin 1869
- Comstock Laws 1873
- Mutual Film v Ohio Ind'l Comm. 1915
- Hays Code 1934
- Burstyn v Wilson 1952
- Roth v US 1957
- Miller v California 1971
- FCC v Pacifica 1978
- Reno v ACLU 1996

Thank You